IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 202 OF 2006.

Miss Maria Eslinda de Silva,
daughter of Jonas Carlos de Silva,
Major of age, Spinster,
Uzro, Raia, Salcete, Goa. .... Petitioner.

Versus

1. Shri Conceicao Dias,
major of age, residing at
Camurlim, Raia, Salcete, Goa.

2. Smt. Cecilia Gurjao,
widow of Joao Francisco Gurjao,
major of age,
residing at: Behind General Post Office,
Carpenter's Lane, Panaji, Goa. .... Respondents.

Mr. V. P. Thali, Advocate for the Petitioner.

Ms. Henrietta Newton, Advocate for the Respondents.

CORAM: J. N. PATEL, J.

DATE: 29th NOVEMBER, 2006.

ORAL JUDGMENT:

Heard the learned counsel for the parties.

2. The short question is whether the trial Court was justified in rejecting the application for condonation of delay.

3. The petitioner/plaintiff has filed a suit against the defendants for seeking perpetual and mandatory injunction which has been registered as Regular Civil Suit No.319/01. It so happened that on the day the suit was listed before the Court for furnishing better particulars, the plaintiff and her counsel could not attend the Court. The plaintiff was absent, but the Advocate of the plaintiff reached the Court late at about 4.30 p.m. In the meantime the suit came to be dismissed.

4. It is the case of the petitioner/plaintiff that the plaintiff could not move the application for restoration because her Advocate was not available due to summer vacation followed by sickness in the following month and therefore the delay in moving the application for restoration was not deliberate and therefore prayed for condonation.

5. The learned Trial Court, by the impugned Order dated 18.10.2002 rejected the application for condonation of delay. The petitioner thereafter preferred an appeal against the impugned order before the District Court. The District Court dismissed the appeal on the ground that it is not maintainable and that is how the petitioner has approached this Court. The learned counsel appearing for the petitioner submitted that the plaintiff could not attend the Court on 20.4.02 as her Advocate had advised her that her presence was not required and as the matter was fixed

for furnishing better particulars, it was expected that the learned Advocate for the plaintiff would take necessary steps but it so happened that the Advocate was busy in some other Court and by the time he reached the Court at 4.30 p.m., the suit came to be dismissed in default. It is therefore submitted that the delay in filing the application for restoration be condoned and the impugned order be quashed and set aside.

6. The learned counsel appearing for the respondents vehemently contested the petition on the ground that the petitioner has instituted about five cases against the respondents and is bent upon harassing the respondent who is a heart patient. It is further contended that the petitioner/plaintiff is a chronic defaulter and has been negligent in conducting the case and on the appointed day inspite of the Court showing latitude to them, they failed to comply with the orders of the court in furnishing better particulars inspite of the fact that the Court granted them further time and therefore the trial Court was justified in rejecting the application for condonation of delay as it found that the plaintiff has not diligently prosecuted the matter and therefore the petition deserves to be dismissed.

7. Having heard the learned counsel for the parties and examined the rival contentions, this Court is of the view that the petitioner deserves a

fair opportunity as what transpires from the pleadings is that it was the fault of the Advocate for the petitioner/plaintiff that the petitioner had to suffer dismissal of the suit for non-prosecution.

8. It is a well accepted principle that the litigant should not suffer due to the fault on the part of his advocate and therefore this Court is inclined to condone the delay by quashing and setting aside the impugned order, but then subject to costs which is quantified at Rs.5000/- to be paid by the Advocate for the petitioner who was appearing on her behalf in the trial Court. The costs be paid within a period of two weeks to the respondents/defendants by depositing it in the Trial Court. On depositing such costs, the respondents/defendants would be at liberty to withdraw the same. In view of the fact that this Court has condoned the delay, the trial Court would take up the application for restoration of the suit and after hearing the parties, dispose it of according to law.

Rule made absolute accordingly in the aforesaid terms.

J. N. PATEL, J.

sl.